of the two deeds, and upon the marketability of the Flagg title. The defendants' understood purpose was to erect a business building upon the entire plot. A municipal zoning ordinance, adopted after the contract was entered into, prohibited erection of such a building within a district which included the Flagg property. The defendants refused to accept a deed from the plaintiffs, who now seek specific performance. *Held,* relief granted. *Biggs et al.* v. *Steinway & Sons* (1920) 229 N. Y. 320, 128 N. E. 211.

A restriction similar to that imposed upon the Flagg premises by the ordinance, if a covenant running with the land, would constitute an incumbrance in impairment of marketability of title. *Kountze* v. *Helmuth* (1893) 67 Hun 343, *aff'd,* 140 N. Y. 432, 35 N. E. 656; *Bull* v. *Burton* (1919) 227 N. Y. 101, 124 N. E. 111; 20 Columbia Law Rev. 76. But as the restriction in the instant case is the result of a valid municipal zoning ordinance, the marketability of title to the Flagg property is not affected thereby. *Lincoln Trust Co.* v. *Williams Bldg. Corp.* (1920) 229 N. Y. 313, 128 N. E. 209. The distinction seems sound for, while such an ordinance does regulate the use of that lot, it does not subtract from the fee in the same way as an easement. As the premises of the plaintiffs are not within the restricted district, the defendants may still use them for their purpose, and on that ground the instant case is distinguishable from *Anderson* v. *Steinway & Sons* (1917) 178 App. Div. 507, 165 N. Y. Supp. 608, *aff'd,* 221 N. Y. 639, 117 N. E. 575. For in that case, the ordinance restricted the use of the property sought to be transferred. But it is submitted that both cases fall within the principle that mere change of circumstances, after the making of a contract, not caused by the parties, is not ground for refusal of specific performance, in the absence of unusual hardship to one of the parties, with correspondingly little benefit to the other. See *Franklin Tel. Co.* v. *Harrison* (1892) 145 U. S. 459, 12 Sup. Ct. 900; *Marble Co.* v. *Ripley* (1870) 10 Wall. 339; Pomeroy, Specific Performance of Contracts (2nd ed. 1897) § 189.

SUBROGATION—MORTGAGES—FAILURE TO EXAMINE RECORDS.—X, being indebted to A, gave him a chattel mortgage as security. X then mortgaged the property covered by the mortgage to A together with other personal property as security for a loan from B. Both mortgages were duly recorded. A threatened to foreclose. By fraudulently representing to the plaintiff bank that his property was unincumbered, X secured a loan, executing a mortgage on the property included in the mortgages to A and B as security. X then paid $2,000 of the money so obtained to A. Soon afterward X died and his property was sold by a receiver. After deducting the balance of A's claim from the proceeds, $2,127 remained. The plaintiff claimed subrogation to the right of A to the extent of $2,000. *Held,* one judge dissenting, subrogation denied on the ground that the plaintiff was negligent in not searching the records. *Southern Trust Co.* v. *Garner* (Ark. 1920) 223 S. W. 369.

One whose property is fraudulently applied to the payment of a creditor will be subrogated to the rights of the latter. *Heller Aller Co.* v. *Ries* (1911) 164 Mich. 501, 129 N. W. 724. And where money obtained by fraud is used to pay a debt of the fraudulent party, subrogation will be granted so long as innocent third parties are not affected. *State Sav. Trust Co.* v. *Spencer* (Mo. 1918) 201 S. W. 967; *Pittsburgh-Westmoreland Coal Co.* v. *Kerr* (1917) 220 N. Y. 137, 115 N. E. 465. The question then arises whether or not negligence on the part of the

defrauded party should bar equitable relief. It has been said that equity will not grant relief as a reward for negligence. See *Ft. D. B. & L. Ass'n* v. *Scott* (1892) 86 Iowa 431, 434, 53 N. W. 283. But where, as in the instant case, the intervening incumbrancer would be in exactly the same position if subrogation were granted that he was in originally, there would seem to be no good reason for denying it. See *Kent* v. *Bailey* (1917) 181 Iowa 489, 500, 164 N. W. 852; *Hill* v. *Ritchie* (1916) 90 Vt. 318, 322, 98 Atl. 497; but see *Rice* v. *Winters* (1895) 45 Neb. 517, 530, 63 N. W. 830. To do so would be to allow the intervening incumbrancer to profit by the fraud of the debtor, which seems essentially inequitable. Hence many courts hold that the mere failure to examine records, although negligence, is not fatal to the plaintiff's cause. *Kent* v. *Bailey, supra; Hill* v. *Ritchie, supra.* Where the plaintiff is guilty of negligence whereby the intervening incumbrancers are actually prejudiced, however, equity will not invoke the doctrine of subrogation. *Wilkins* v. *Gibson* (1901) 113 Ga. 31, 38 S. E. 374. In the light of these considerations, the conclusion reached by the instant case seems unsound.

TORTS—NEGLIGENCE—DUTY OF LANDOWNER TO FIREMAN ENTERING PREMISES.—The plaintiff, a fireman, in answering an alarm sent in by the defendant's servant, fell into a coal hole negligently left open in a driveway on the defendant's premises. The plaintiff sues to recover for his injuries. *Held,* three judges dissenting, for the plaintiff. *Meiers* v. *Fred Koch Brewery* (N. Y. 1920) 127 N. E. 491.

By the weight of authority a fireman is a mere licensee to whom a landowner is liable only for affirmative negligence. *Woodruff* v. *Bowen* (1893) 136 Ind. 431, 34 N. E. 1113; *Gibson* v. *Leonard* (1892) 143 Ill. 182, 32 N. E. 182. The lower courts of New York have also taken this view. *Eckes* v. *Stetler* (1904) 98 App. Div. 76, 90 N. Y. Supp. 473. Some courts have concluded that a fireman is a licensee, because he is said to be "licensed by law" to enter on premises in pursuit of his duty. See Cooley, Torts (3rd ed., 1906) 648. But a license implies consent and acceptance whereas a fireman is in duty bound to enter even if the landowner orders him to stay off. See Cooley, *op. cit.,* 648. The Massachusetts Court has given to a policeman who enters at an occupant's request the status of an invitee. *Learoyd* v. *Godfrey* (1885) 138 Mass. 315. This view also seems unsound. The privilege of a fireman or policeman depends on public duty and not on any express or implied invitation. See *Lunt* v. *Post Printing Co.* (1910) 48 Colo. 316, 324, 110 Pac. 203. Furthermore an invitation will only be implied where one comes on land for a purpose connected with the business of the landowner or with a business which he permits to be carried on there. *Plummer* v. *Dill* (1892) 156 Mass. 426, 31 N. E. 128. But a fireman may or may not enter on premises for a purpose connected with the owner's business. *Cf. Low* v. *Grand Trunk Ry.* (1881) 72 Me. 313. It is submitted that firemen and policemen are neither licensees nor invitees; they safeguard the property and life of the community and as a matter of public policy should be given every protection possible. On that ground the courts should place property holders under a duty to use due care toward them.

TRIAL BY JURY—LONG ACCOUNT—EXAMINATION OF PARTY BEFORE TRIAL.—In an action for goods sold and delivered involving a long account, the Federal District Court for the Southern District of New York,